Supreme Court, U.S.
FILED
JUL 16 2001
OFFICE OF THE CLERK

No. 00-927

In the Supreme Court of the United States

ELAINE L. CHAO, SECRETARY OF LABOR,
PETITIONER

v.

MALLARD BAY DRILLING, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). To that end, it applies broadly to "employment performed in a workplace in a State," as well as in specified territories and "Outer Continental Shelf lands," 29 U.S.C. 653(a). It further imposes on each employer a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. 654(a)(1), as well as the obligation to comply with occupational safety and health standards promulgated by the Secretary of Labor, 29 U.S.C. 654(a)(2). See generally 29 C.F.R.

1910 (setting forth comprehensive occupational safety and health standards).

Section 4(b)(1) of the OSH Act provides that another federal agency can displace application of the OSH Act only for "working conditions * * * with respect to which [that agency] * * * exercise[s] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1). As we explain in our opening brief (at 16-18, 19-20), that language and its drafting history make clear that, in order to displace OSH Act coverage, an agency must not only *possess* authority to regulate occupational safety and health in a particular industry, but also actually "*exercise*" that authority. Furthermore, because the OSH Act is displaced only for "working conditions * * * with respect to *which*" the other agency has exercised its authority, an agency's regulation of *some* workplace conditions in a particular industry does not create an industry-wide exemption that displaces OSH Act regulation of *other* conditions. See *id.* at 18-19. Rather, as the drafting history confirms, see *id.* at 20-21, displacement of the OSH Act turns on whether the other agency has exercised its authority with respect to the particular working conditions at issue.

Finally, "working conditions," as used in Section 4(b)(1), means the physical and environmental hazards encountered by an employee in the course of the job, rather than the "environmental area" in which the employee customarily works. Gov't Br. 24-29. Under either definition, however, the Coast Guard has not regulated the working conditions at issue in this case, and therefore the OSH Act continues to apply. *Id.* at 29-32.

Respondent does not discuss the text or drafting history of Section 4(b)(1). Nor does respondent dispute our submission that, under a hazard-based definition of "working conditions," there is no preemption of OSH Act authority in this case because the Coast Guard has no regulation addressing the hazard at issue. See Resp. Br. 31. Instead, respondent proposes alternative interpretations of Section 4(b)(1), primarily of the term "working conditions." *Id.* at 29-35. Respondent also argues that the Coast Guard has sufficient authority over the working conditions of seamen to preclude OSH Act authority. *Id.* at 13-29. Finally, as an alternative ground for affirmance, respondent argues that a work site in the territorial waters of a State is not a "workplace in a State" covered by Section 4(a) of the OSH Act, 29 U.S.C. 653(a). Resp. Br. 35-41. Respondent's arguments misconstrue the OSH Act and the Coast Guard's authority and are unsound as a matter of policy.

1. Respondent argues that the phrase "working conditions" in Section 4(b)(1) means "the general area or work site in which employees perform their daily tasks." Resp. Br. 29. Thus, in respondent's view, "working conditions" means an entire plant or, in this case, the entire vessel on which the employees work. *Id.* at 30-31.

As we explain in our opening brief (at 25, 28), however, an area-based definition of "working conditions" cannot be reconciled with the ordinary meaning of "conditions," which are *circumstances* that exist *within* an area. Nor is an area-based definition consistent with the surrounding text of Section 4(b)(1) and its drafting history, which indicate that the OSH Act is displaced only for the "*particular* working conditions" (S. Rep. No. 1282, 91st Cong., 2d Sess. 22 (1970) (emphasis

added)) "with respect to *which*" (29 U.S.C. 653(b)(1) (emphasis added)) another agency has exercised its authority. See Gov't Br. 18-21, 28-29. Finally, an area-based definition would frustrate the OSH Act's fundamental purpose, which is to provide comprehensive protection from occupational safety and health hazards, because that definition would result in gaps in coverage. *Id.* at 29; see pp. 5-6 *infra*.

Even the two courts of appeals that have endorsed an area-based definition of working conditions use a definition that is significantly narrower than the "entire" work site definition that respondent advocates. See Resp. Br. 30. Those courts of appeals limit the "area" that they regard as the relevant "working conditions" to that *portion* of the work site that presents the relevant hazard. See Gov't Br. 30-31. Under that approach, the OSH Act has not been displaced here, because the Coast Guard has neither promulgated regulatory requirements governing the atmosphere of uninspected barges operating on inland waters nor articulated a policy that such areas should not be subject to such requirements. See *id.* at 31-32.

Respondent's assertion (Br. 31-32) that the Secretary's approach will result in inconsistent enforcement and an unclear division of regulatory responsibility is mistaken for several reasons. First, it is based on an incorrect characterization of the Secretary's interpretation of "working conditions." Respondent asserts that, under the Secretary's interpretation, OSH Act regulation on a vessel can be preempted only if the Coast Guard "has a substantially similar or 'redundant' regulation addressing the exact same hazard and with the exact same intent." *Id.* at 31. To the contrary, under the Secretary's approach, "if the other agency has exercised its statutory authority, OSH Act

coverage is displaced regardless of whether the other agency's requirements are the same as or different from, or are more or less stringent than, the requirements that would apply under the OSH Act." Gov't Br. 16 n.5. Indeed, the Secretary recognizes that the Coast Guard may preempt OSH Act coverage of particular working conditions without imposing *any* regulatory requirements, if the Coast Guard articulates a policy that no such requirements are warranted. *Id.* at 18, 36. The Secretary's approach thus prevents duplicative regulation of the same occupational safety and health hazard and provides clear guidelines regarding the boundaries between OSHA and Coast Guard jurisdiction.

Second, respondent acknowledges (Br. 29) that other courts of appeals have approved the Secretary's approach, yet respondent points to no evidence that adverse consequences have resulted in those circuits. Moreover, as previously explained, the Secretary's longstanding approach to preemption of OSH Act coverage is similar to the approach this Court uses in addressing the parallel issue of Coast Guard preemption of state laws under Title I of the Ports and Waterways Safety Act of 1972, 33 U.S.C. 1221 *et seq.* See Gov't Br. 23-24 (discussing *United States* v. *Locke*, 529 U.S. 89, 108-110 (2000)). That approach (which has been in place at least since this Court's decision in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978)) has not resulted in confusion and inconsistent regulation.

Third, the fundamental purpose of the OSH Act is to assure, so far as possible, safe and healthful working conditions for "every working man and woman in the Nation." 29 U.S.C. 651(b); see Gov't Br. 32-35. Respondent's proposed definition of "working conditions" would defeat that purpose. If "working conditions"

means an entire plant or an entire vessel, as respondent argues, then another federal agency's regulation of only one hazardous condition in a plant or on a vessel would prevent OSHA from regulating all other conditions, even if no other agency had authority to regulate them. For example, in respondent's view, the Coast Guard's regulation requiring the *Mr. Beldon* to have toilets that do not cause bodily injuries or allow toxic substances to escape into the interior of the vessel, 33 C.F.R. 159.95, would prevent OSHA from regulating unguarded machines and blood-borne pathogens, see *Herman* v. *Tidewater Pac., Inc.*, 160 F.3d 1239 (9th Cir. 1998), noise, see *Donovan* v. *Red Star Marine Servs., Inc.*, 739 F.2d 774 (2d Cir. 1984), cert. denied, 470 U.S. 1003 (1985), or the drilling hazards at issue in this case. Indeed, under respondent's theory, the Coast Guard's casualty reporting requirements, which do not set any workplace health or safety standards at all, see 46 U.S.C. 6301-6307 (1994 & Supp. V 1999); 46 C.F.R. Pt. 4, preempt all OSH Act coverage of all vessels. See Resp. Br. 18-19. Respondent's interpretation of "working conditions" would result in the kind of industry-wide exemptions and gaps in worker protection that courts have repeatedly rejected as inconsistent with the purposes of the OSH Act. See *Red Star Marine*, 739 F.2d at 780; *Baltimore & Ohio R.R.* v. *OSHRC*, 548 F.2d 1052, 1054 (D.C. Cir. 1976); *Southern Pac. Transp. Co.* v. *Usery*, 539 F.2d 386, 391 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977).[1]

[1] Respondent argues in the alternative (Br. 32-33) that any regulation of a "class of workers" displaces all OSHA regulation of the working conditions of those workers. As explained in the Secretary's opening brief (at 18-19, 20-21), that view of Section 4(b)(1) is inconsistent with the statutory text, and the drafting history demonstrates that the text was changed deliberately to avoid the result that respondent seeks. Respondent erroneously relies on *Organized Migrants in Community Action, Inc.* v. *Brennan*, 520 F.2d 1161, 1167 (D.C. Cir. 1975), to support its argument. Although the D.C. Circuit held in *Organized Migrants* that the EPA's regulation of farmworker exposure to pesticides preempts OSHA's regulation of that subject, see *id.* at 1163, 1169, it did not hold that another agency's regulation of *some* working conditions would preempt OSHA regulation of *other* conditions of those workers. The D.C. Circuit has specifically rejected that interpretation. See *Association of Am. R.R.* v. *Department of Transp.*, 38 F.3d 582, 586-587 (1994); see also Gov't Br. 40 n.20 (noting that EPA coordinated its pesticide regulation with OSHA's field-sanitation and hazard-communication standards).

In any event, the Secretary ensures against inconsistent enforcement of the OSH Act by issuing directives to compliance officers that delineate the lines of responsibility between OSHA and the Coast Guard and provide for coordination between the two agencies. See OSHA Instruction CPL 2-1.20, at 4-13 (Nov. 8, 1996) (Secretary's Exh. C-2). Such coordination occurred in this case, in which OSHA based its citations on information collected by the Coast Guard. Pet. App. 2a. Vessel owners are also well aware of the Secretary's interpretation of her OSH Act authority, because that interpretation has been set out in long-standing regulations, three decades of citations for OSH Act violations, as well as a statutorily-mandated report to Congress. See Gov't Br. 38-40; cf. *United States* v. *Mead Corp.*, 121 S. Ct. 2164 (2001) (discussing varying degrees of deference to agency interpretations in administering a statute).[2]

[2] Respondent contends that the Secretary is "hypocritical" in citing employers under the OSH Act's general duty clause, 29 U.S.C. 654(a)(1), while (supposedly) arguing that the Coast Guard and other agencies must promulgate specific regulations in order to preempt the OSH Act. Resp. Br. 34. As we have explained,

2. Respondent also argues that the Secretary misconstrues the extent of the Coast Guard's authority to regulate uninspected vessels. Resp. Br. 17. In particular, respondent argues that 14 U.S.C. 2 gives the Coast Guard plenary and exclusive authority over the working conditions of seamen on vessels on navigable waters. See Resp. Br. 9-10, 13-14, 15, 18, 27-29; see also Amicus Br. of Associated Gen. Contractors of Am. (AGC) 5-12. Respondent further argues that the Coast Guard has promulgated extensive regulations that are sufficient to preempt the OSH Act. Resp. Br. 14-29; see also Amicus Br. of Transportation Inst. (TI) 4-8. Respondent's arguments do not withstand scrutiny.

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pp. 4-5, *supra*, the Secretary does not contend that other agencies may displace the OSH Act only by promulgating a specific regulation governing a specific hazard. Here, however, the Coast Guard has no regulation comparable to the OSH Act's general duty clause, 29 U.S.C. 654(a)(1), requiring uninspected vessels to be free from all recognized hazards likely to cause death or serious physical harm to employees. Coast Guard regulations do authorize Coast Guard officers to "order a vessel to operate or anchor in the manner directed" if "such [an] order is justified in the interest of safety by reason of * * * temporary hazardous circumstances, or the condition of the vessel." 33 C.F.R. 160.111. But that provision authorizes the Coast Guard to *react* to emergency situations that threaten *vessels, waterways, or waterfront facilities*; it does not prescribe fixed *standards* or impose a general duty on maritime employers to protect the *occupational safety and health* of *employees* on uninspected vessels. Nor does the statutorily-imposed and judicially-enforced duty to provide a seaworthy vessel, see 46 U.S.C. 10903; Resp. Br. 33, constitute an "exercise" of "authority" by a "Federal agenc[y]" under Section 4(b)(1). See *Tidewater Pac.*, 160 F.3d at 1246 (explaining why seaworthiness doctrine does not preempt OSH Act coverage).

a. Under 14 U.S.C. 2, the Coast Guard shall, among other things,

> administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department.

Section 2 serves as a codification and description of the Coast Guard's authority under other provisions of law. See 14 U.S.C. 2 note (Historical and Revision Notes) (explaining that Section 2 "contains a codification of functions" that "sets forth in general language the primary responsibilities of the Coast Guard" and "outline[s] in general terms in one section the broad scope of the functions of the Coast Guard"); S. Rep. No. 656, 81st Cong., 1st Sess. 3 (1949) (noting that the "primary duties of the service are stated in general terms in Section 2" and "these duties are set forth in detail" in other provisions of law); H.R. Rep. No. 557, 81st Cong., 1st Sess. 3, A2 (1949) (same). Thus, Section 2 has not been understood to be a plenary grant of independent authority, or to vest the Coast Guard with responsibility for issuing pervasive occupational health and safety regulations covering seamen in the absence of more specific statutory authority.

In any event, nothing in Section 2 precludes the exercise of authority by other agencies, such as OSHA, over seamen on navigable waters. To the contrary, Section 2 expressly recognizes that some "matters" are "delegated by law to * * * other executive department[s]." 14 U.S.C. 2. Here, the OSH Act delegates to the Secretary of Labor the authority to regulate occupational safety and health in "employment per-

formed in a workplace in a State," including on navigable waters within a State. 29 U.S.C. 653(a); see also pp. 16-19, *infra*. Nor does *Foremost Insurance Co.* v. *Richardson*, 457 U.S. 668 (1982), on which respondent relies (Br. 18), suggest that Section 2 vests the Coast Guard with exclusive authority over safety on navigable waters. In that case, this Court held that a federal court had admiralty jurisdiction under 28 U.S.C. 1333(1) to decide a wrongful death action resulting from the collision of two pleasure boats on a Louisiana river. 457 U.S. at 674. The Court said nothing about 14 U.S.C. 2 or the Coast Guard's jurisdiction.[3]

Furthermore, under Section 4(b)(1) of the OSH Act, the mere possession of authority—under 14 U.S.C. 2 or any other statute—is not enough to exclude OSH Act coverage. To displace OSH Act coverage, an agency

[3] The Second Circuit in *Red Star Marine*, 739 F.2d at 778-779, explained why the lower court decisions cited by respondent (Br. 23-24, 27-29) are not persuasive. See also Gov't Br. 8-9, nn. 2 & 4; Gov't Pet. Reply 3 n.1. As for the Occupational Safety and Health Review Commission decision on which respondent relies, *Secretary of Labor* v. *Dillingham Tug & Barge Corp.*, 10 O.S.H. Cas. (BNA) 1859 (1982), subsequent Commission decisions have rejected a reading of *Dillingham* that would endorse an industry-wide exemption from OSH Act coverage for seamen and have held that working conditions on uninspected vessels may be subject to the OSH Act. See *Secretary of Labor* v. *Tidewater Pac. Inc.*, 17 O.S.H. Cas. (BNA) 1920, 1923-1924 (1997), aff'd, 160 F.3d 1239 (9th Cir. 1998); *Secretary of Labor* v. *Alaska Trawl Fisheries Inc.*, 15 O.S.H. Cas. (BNA) 1699, 1704-1705 (1992). Moreover, contrary to respondent's contention (Br. 25), we do not seek judicial deference to *Commission* precedent interpreting Section 4(b)(1). This Court has made clear that the *Secretary's* interpretation, as reflected in her enforcement citation, not the Commission's decision, is entitled to deference. See *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991); Gov't Br. 38.

with authority to regulate occupational safety and health must "exercise" that authority. 29 U.S.C. 653(b)(1); Gov't Br. 14-21.[4]

b. Respondent does not dispute that the Coast Guard does not regulate the working condition at issue in this case—the risk of explosion caused by natural gas in the atmosphere of an uninspected barge drilling on inland waters. See Resp. Br. 31; see also Gov't Br. 29-32. Nonetheless, relying largely on a list of Coast Guard regulations appended to TI's amicus brief (Resp. Br. 15 (citing TI Br. App. 1a-2a)),[5] respondent argues that the Coast Guard's regulation of uninspected vessels is sufficient to displace the OSH Act. *Id.* at 15-23.[6]

[4] Amicus TI errs in contending (Br. 8-10) that 46 U.S.C. 2103 and 2104 give the Coast Guard exclusive jurisdiction over vessels. Although Section 2104 has been construed to prevent the Secretary of Transportation from delegating his statutory authority to an agency other than the Coast Guard, see *Halverson* v. *Slater*, 129 F.3d 180 (D.C. Cir. 1997), it does not prevent other agencies from exercising the authority Congress has given them under statutes such as the OSH Act. And Section 2103 expressly recognizes that "vessels and personnel" may be "subject, under other law, to the supervision of another official of the United States Government."

[5] The appendix to this brief identifies the subject matter and applicability of each of the regulations included in the Appendix to TI's brief.

[6] The American Waterways Operators (AWO) argues (Br. 2-3) that the Court should decide only whether the Coast Guard has displaced OSH Act regulation of the *Mr. Beldon* and not whether the Coast Guard has displaced OSH Act regulation of other uninspected vessels. The AWO then argues (Br. 4-23) that the Coast Guard has displaced OSH Act regulation of tugs and barges operated by its members. We only ask the Court to hold that the Fifth Circuit erred in creating an industry-wide exemption for seamen on uninspected vessels and that the Coast Guard has not displaced OSH Act regulation of the *Mr. Beldon*, either generally or with respect to the hazard at issue here. Whether the OSH Act

Respondent's argument is fundamentally flawed because, under Section 4(b)(1), OSH Act coverage is displaced only when another agency has actually exercised its statutory authority "with respect to" the "working conditions" at issue. See Gov't Br. 16-21; p. 2, *supra*. Moreover, respondent overstates the extent to which the Coast Guard regulates occupational safety and health on uninspected vessels generally and on the *Mr. Beldon* (and other uninspected barges operating on inland waters) in particular.

Respondent places special reliance (Br. 16-17) on the regulations in Subchapter C of Chapter I of Title 46 of the Code of Federal Regulations. As we explain in our opening brief (at 4-5, 9 & n.3), that Subchapter (entitled "Uninspected Vessels") contains the bulk of the Coast Guard regulations that are generally applicable to uninspected vessels, including regulations directed at occupational safety and health. Those regulations, however, address only a limited range of occupational safety and health hazards, and do not apply to all types of uninspected vessels. Of particular significance to this case, they do not apply to uninspected barges that do not carry passengers, such as the *Mr. Beldon*. See 46 C.F.R. 24.05-1 (Table 24.05-1(a) (Col.6)), 24.10-27. Nor do they address hazards related to oil drilling operations on inland waters, such as the risk of explosion from natural gas. See App., *infra*, 4a-9a.

Respondent also relies (Br. 18-23) on Coast Guard regulations that govern the reporting and investigation of marine accidents on both inspected and uninspected

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is displaced with respect to working conditions in other situations, including those involving AWO vessels, requires consideration of the particular working conditions, type of vessel, and Coast Guard regulations at issue.

vessels. See 46 C.F.R. Pt. 4 (discussed at Gov't Br. 5 n.1). Respondent argues that those regulations give the Coast Guard authority over the working conditions of seamen on uninspected vessels that is quite similar to OSHA's regulation of ordinary workplaces. Regulations that govern reporting and investigation of casualties that have already occurred, however, do not regulate "working conditions," even though marine casualties may, in some instances, result from unsafe working conditions.[7]

Many of the other Coast Guard regulations on which respondent relies apply only to certain types of uninspected vessels or to uninspected vessels engaged in certain activities. See, *e.g.*, 33 C.F.R. Pt. 156; 46 C.F.R. 42.09, 42.15. Others deal with navigation or other matters that bear only indirectly or in limited respects on workplace health and safety. See, *e.g.*, 33 C.F.R. Pt. 81; 33 C.F.R. Pt. 164; 46 C.F.R. 67.121, 67.123.[8] The only regulatory requirements identified by respondent and its amici (apart from the marine casualty reporting

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[7] Respondent also argues (Br. 19-20) that OSHA reporting requirements duplicate Coast Guard reporting requirements. Respondent, however, was not cited for violating OSHA reporting requirements. Accordingly, the question whether Coast Guard reporting requirements may in some instances preempt OSHA reporting requirements is not presented in this case. See also *Tidewater Pac.*, 160 F.3d at 1246-1247 (whether OSHA may enforce recordkeeping requirements is addressed by 29 U.S.C. 657(c)(1), not by the provision at issue in this case, 29 U.S.C. 653(b)(1)).

[8] Still others do not apply to uninspected vessels at all. See 46 C.F.R. Pts. 52, 58, 61; 46 C.F.R. 56.50-85; 46 C.F.R. 61.15-10; 46 C.F.R. 113.25; 46 C.F.R. 199.620. Section 160.151-57(p) of Title 46 imposes requirements not on vessels but on liferaft servicing facilities. And, although the *Mr. Beldon* was documented under 46 C.F.R. Pt. 67, there was no requirement that it be documented.

requirements) that applied to the *Mr. Beldon* while it was drilling in Little Bayou Pigeon are the Marine Sanitation Device regulations, 33 C.F.R. Pt. 159, and certain provisions of the Pollution Prevention, 33 C.F.R. Pt. 155, and Ports and Waterways Safety Act (PWSA) regulations, 33 C.F.R. Pt. 160. None of those provisions regulates the hazard of explosion caused by natural gas.[9] Accordingly, none represents an exercise of authority by the Coast Guard over the working conditions at issue in this case.

c. Respondent argues that exclusive reliance on Coast Guard regulations would be better policy because the Coast Guard has expertise regarding the assertedly "unique" working conditions of seamen aboard vessels, and confusion and wasted resources will result if both OSHA and the Coast Guard regulate seamen. Resp. Br.

[9] The Marine Sanitation Device regulations primarily protect the marine environment from the discharge of untreated sewage, see 33 C.F.R. 159.1, although they contain a few provisions directed at the health and safety of those on board vessels, see 33 C.F.R. 159.95, 159.129, 159.131. The Pollution Prevention Regulations are directed at preventing and responding to the discharge of oil and liquid hazardous materials from vessels, see, *e.g.*, 33 C.F.R. 155.1010, 155.1110, 155.1210, 155.2210; 33 C.F.R. Pt. 155, App. C, § 4, and require certain vessels to have response plans that address, among other things, OSHA requirements for worker health and safety hazards posed by spills, see 33 C.F.R. Pt. 155, App. C, § 2.2.16. The response plan requirements, however, apply only to vessels that carry oil as cargo, see 33 C.F.R. 155.1015, 155.1110, 155.1210, 155.2210, and only to oil spills from vessels, not to the release of natural gas from a well blowout. The PWSA regulations seek "to insure the safety of vessels and waterfront facilities, and the protection of the navigable waters and the resources therein." 33 C.F.R. 160.101. Although they may indirectly affect occupational safety and health, those provisions do not regulate or prescribe standards respecting "working conditions." See, *e.g.*, 33 C.F.R. 160.111 (discussed in note 2, *supra*).

14-15, 23-27. Contrary to respondent's assertion that the working conditions of seamen aboard uninspected vessels are "unique" (*id.* at 14), their employment often involves hazards similar to those faced by land-based employees. See *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1527, 1530 (11th Cir.) (crane safety), cert. denied, 479 U.S. 883 (1986); *Red Star Marine*, 739 F.2d at 775 (excessive noise); *Secretary of Labor* v. *Alaska Trawl Fisheries, Inc.*, 15 O.S.H. Cas. (BNA) 1699, 1703 (1992) ("factory conditions" involving cleaning, processing, freezing, and packaging fish); Pet. App. 11a (respondent's drilling operations). OSHA has experience and expertise concerning such conditions, and, to the extent that further expertise is necessary, OSHA coordinates with the Coast Guard. See Gov't Br. 38 n.18.[10]

Furthermore, respondent's arguments concerning duplication and confusion are unfounded. Under the Secretary's longstanding interpretation of Section 4(b)(1), only one agency regulates a particular occupational safety and health hazard. OSHA's regulation is only displaced if another agency has promulgated a regulation governing the hazard or articulated a policy that regulatory requirements should not be imposed for that hazard or a set of hazards that includes it. See Gov't Br. 35-37; pp. 2, 4-5, *supra*. In addition, OSHA

[10] In arguing that seamen's "unique" working conditions require exclusive Coast Guard jurisdiction, respondent mistakenly relies (Br. 14) on *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 38 (1942). In that case, the Court held that the NLRB abused its discretion by requiring the owner of a ship to reinstate seamen fired for a strike that was illegal under federal maritime law. *Id.* at 38-40. The Court did not hold that the NLRB lacked jurisdiction over the seamen. Rather, the Court affirmed the Board's authority to require the shipowner to bargain with the employees. *Id.* at 48-49.

has issued enforcement directives that explain in detail the different spheres of OSHA and Coast Guard authority. See p. 7, *supra*. See also *Locke*, 529 U.S. at 108-110 (applying similar rule governing preemption of state laws by Coast Guard regulations without indicating any concern over confusion or wasted resources). Respondent's proposed approach not only is unnecessary to avoid duplication and confusion but also would defeat the OSH Act's fundamental purpose of protecting each working man and woman, 29 U.S.C. 651(b), because it would leave gaps in coverage. See Gov't Br. 32-35.

3. As an alternative ground in support of the judgment below, respondent argues (Br. 35-41) that the *Mr. Beldon* is not subject to the OSH Act because it was operating "within the territorial waters of the United States" at the time of the explosion, and such waters are not covered under 29 U.S.C. 653(a). Because that argument was not addressed by the court of appeals, Pet. App. 7a, this Court need not consider it. See *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996).

Respondent's argument is also lacking in merit. The OSH Act applies "with respect to employment performed in a workplace in a State." 29 U.S.C. 653(a). Respondent stipulated that the *Mr. Beldon* was operating in a bayou about 30 miles northwest of Morgan City in the Parish of St. Martin in the territorial waters of the State of Louisiana. Exh. J-1 ¶¶ 10, 11; see also Exhs. C-4, C-5, C-6 (photographs of work site); Pet. App. 2a, 11a; Resp. Br. 2, 6. Because those waters are "internal waters of the State," *United States* v. *Maine*, 469 U.S. 504, 513 (1985), respondent's bayou work site was "in [the] State." 29 U.S.C. 653(a); see *Tidewater*

Pac., 160 F.3d at 1243 (holding that a vessel on state territorial waters is a "workplace in a State").[11]

Respondent attempts to avoid the plain meaning of "a workplace in a State," 29 U.S.C. 653(a), by arguing (Br. 36-39) that the phrase refers only to land under navigable waters within a State's boundaries but not the navigable waters themselves. Congress's reference to workplaces "in a State," however, was plainly intended to identify the reach of the Act in geographic or territorial terms, and to do so comprehensively, by including all areas within the boundaries of the States. There can be no doubt that the navigable waters where respondent's barge was located, like the submerged lands underlying those waters (to which the barge was affixed, see Def's Exh. 2), are within the State of Louisiana in a geographical or territorial sense. Excluding workplaces on the waters would create a gap in coverage that the comprehensive territorial reach of the Act, set forth in Section 653(a)(1), was intended to foreclose.

Respondent's assertion (Br. 36-38) that the Submerged Lands Act (SLA), 43 U.S.C. 1301 *et seq.*, and this Court's decision in *United States* v. *Louisiana*, 363 U.S. 1 (1960), support its argument is incorrect. The SLA gives States title to and ownership of lands under "navigable waters *within the[ir] boundaries*," 43 U.S.C. 1311(a) (emphasis added), and also allows States to extend their seaward boundaries three miles from

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[11] Respondent inaccurately asserts (Br. 35) that *Donovan* v. *Texaco, Inc.*, 720 F.2d 825, 829 (5th Cir. 1983), held that a vessel operating in territorial waters of the United States is not a "workplace" under Section 4(a). The court held only that "[a] vessel *on the high seas* is not such a 'workplace.'" *Ibid.* (emphasis added).

their coast lines, 43 U.S.C. 1312. The SLA thus recognizes that State territory includes "[w]aters landward of the coastline" and "waters up to three miles seaward of the coastline," *Maine*, 469 U.S. at 513, not simply the submerged lands under those waters. Nor does the Court's discussion of the SLA in the *Louisiana* case, 363 U.S. at 8-10, suggest that waters *landward* of a State's coastline, such as a bayou in a parish in Louisiana, are outside of that State. See also *United States* v. *California*, 332 U.S. 19, 36-37 (1947) (recognizing States' authority over inland waters).[12]

Respondent notes (Br. 37-38) that the SLA preserves the federal government's right to regulate and control both submerged lands and state territorial waters for the constitutional purposes of commerce, navigation, national defense, and international affairs. See 43 U.S.C. 1314. That reservation of regulatory authority, however, does not transform navigable waters within a State's boundaries into "a federal territory within the meaning of the OSH Act and not 'a work place in a state.'" Resp. Br. 38. Instead, it recognizes the dual regulatory authority of the United States and individual States over navigable waters in the State. Cf. *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199,

[12] Respondent argues (Br. 39-40) that recognizing OSH Act jurisdiction over vessels on state waters is unworkable because they would "steam in and out of OSHA coverage" when they traveled between those waters and the high seas. It is not uncommon, however, for regulatory requirements concerning vessels (even requirements imposed by the Coast Guard) to vary depending on where the vessels travel. See, *e.g.*, 46 C.F.R. 42.03-5 (load line requirements for U.S. flag vessels engaged in foreign or international voyages, domestic voyages by sea, or Great Lakes voyages).

207 (1996) (concurrent state and federal remedies for wrongful deaths within a State's territorial waters).

Similarly, 33 C.F.R. 2.05-25(a), cited by respondent (Br. 38), does not purport to define OSH Act coverage or state boundaries. Instead, it defines the Coast Guard's regulatory jurisdiction to include navigable waters, whether they are lakes, rivers, or water outside the country's coastline. See 33 C.F.R. Subpt. 2.05. That assertion of jurisdiction does not transform a lake, river, or bayou inside a State into a federal territory outside the State. Cf. *Louisiana* v. *Mississippi*, 466 U.S. 96, 99-101 (1984) (recognizing Louisiana's boundary *in* the Mississippi River). Employment in those locations is "employment performed in a workplace in a State" under 29 U.S.C. 653(a), whether or not the locations are also subject to the Coast Guard's jurisdiction.[13]

[13] Respondent asserts (Br. 40) that OSHA regulations were not written with vessels and crewmen in mind, that operators in the marine industry were never given an opportunity to participate in the rulemaking process, and that there was no cost-benefit analysis in which vessel owners/operators were considered. Because respondent did not raise that argument below or in its brief in opposition, it is waived. See Sup. Ct. R. 15.2; *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 738-739 (1998). We note, however, that Congress required OSHA initially to promulgate regulations without notice and comment. See 29 U.S.C. 655(a); 29 C.F.R. 1910.1(a), 1910.11. When OSHA has subsequently issued regulations with notice and comment, see 29 U.S.C. 655(b), operators in the marine industry have had the same opportunities to comment as other members of the general public. The OSH Act does not require a cost-benefit analysis. See *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 506-522 (1981). Nor are OSHA's regulatory analyses limited to specific industries as respondent asserts. See, *e.g.*, 54 Fed. Reg. 9294, 9311-9312 (1989) (analyses for standards that were part of the basis on which respondent was cited in this case).

* * * * *

For the foregoing reasons, and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2001

APPENDIX

Regulation	Subject Matter	Applicability
33 C.F.R. Pt. 81 72 COLREGS: Implementing Rules	Implements the International Regulations for Preventing Collisions at Sea, including alternate requirements for light, shape, and sound signals. Does not regulate occupational safety and health hazards.	Applies when vessel is in navigation on the high seas. Did not apply to the *Mr. Beldon* at the time of the explosion because it was on inland waters and not in navigation.
33 C.F.R. Pt. 155 Pollution Prevention Regulations	Contains regulations to prevent and respond to water pollution from oil or liquid hazardous substances. Generally does not regulate occupational safety and health hazards, although oil spill response plan provisions require response plans to address OSHA regulations on hazardous substance releases.	Applicability varies by vessel type and activity. Most provisions, including oil spill response plan requirements, apply only to vessels that carry oil as cargo. Only §§ 155.400 (platform machinery space drainage), 155.450 (placard noting that discharge of oil or oily waste is prohibited), and 155.770 (prohibition on intentional drainage of oil or liquid hazardous material into bilge) applied to the *Mr. Beldon* at the time of the explosion.

Regulation	Subject Matter	Applicability
33 C.F.R. Pt. 156 Oil and Hazardous Material Transfer Operations	Sets requirements for transfers of oil or liquid hazardous materials to, from, or within a vessel with a capacity of 250 barrels or more. Does not regulate occupational safety and health hazards.	Applies when vessels with capacity of at least 250 barrels are transferring oil or liquid hazardous materials. Did not apply to the *Mr. Beldon* at the time of the explosion because it was not engaged in a transfer.
33 C.F.R. Pt. 159 Marine Sanitation Devices	Sets requirements for design, construction, and certification of marine sanitation devices. Not primarily directed at occupational safety and health hazards. Contains a few provisions that regulate hazards (§§ 159.95, 159.129, and 159.131) unrelated to drilling operations on inland waters.	Applies to all vessels equipped with marine sanitation devices. Applies to the *Mr. Beldon*.

Regulation	Subject Matter	Applicability
33 C.F.R. Pt. 160 Ports & Waterways Safety	Implements Ports & Waterways Safety Act, 33 U.S.C. 1221 *et seq.*, and related statutes, to insure the safety of vessels and waterfront facilities and the protection of navigable waters. Does not regulate occupational safety and health hazards, but may indirectly affect occupational safety and health.	Applicability varies by vessel type and activity. Only §§ 160.111 (special orders applying to vessel operations) and 160.215 (notice of hazardous conditions) applied to the *Mr. Beldon* at the time of the explosion.
33 C.F.R. Pt. 164 Navigation Safety Rules	Sets requirements for navigation procedure, publications, and equipment. Does not regulate occupational safety and health hazards.	Applies to certain self-propelled vessels when they are destined for or departing from a United States port. Does not apply to the *Mr. Beldon*, which is a barge.

Regulation	Subject Matter	Applicability
46 C.F.R. Pt. 16 Drug & Alcohol Testing-	Prescribes standards, procedures, and means to test for drug and alcohol use by "crew members" under 46 C.F.R. 16.105. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies to vessels carrying "crew members," *i.e.*, individuals holding a license, cetificate of registry or merchant mariner's document. 46 C.F.R. 16.105. Does not apply to the *Mr. Beldon*, whose seamen were not "crew-members" under 46 C.F.R. 16.105.
46 C.F.R. Pt. 24 Uninspected Vessels—General Provisions	Sets out definitions and identifies classes of vessels subject to 46 C.F.R. Pts. 25-28, the regulations generally applicable to uninspected vessels. Does not itself regulate occupational safety and health hazards.	Makes clear that none of the provisions in 46 C.F.R. Pts. 25-28 applies to the *Mr. Beldon*, an uninspected barge that does not carry passengers.

Regulation	Subject Matter	Applicability
46 C.F.R. 25.25 Life Preservers & Other Lifesaving Equipment	Establishes requirements for life preservers and other lifesaving equipment. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies to all vessels covered by 46 C.F.R. Pts. 24-28, except vessels used or leased, rented or chartered for noncommercial use, vessels propelled by sail not carrying passengers for hire, and barges not carrying passengers for hire. Does not apply to the *Mr. Beldon*, a barge that does not carry passengers for hire.
46 C.F.R. 25.26 Emergency Position Indicating Radio Beacons	Sets requirements for emergency position indicating radio beacons. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies to commercial fishing industry vessels and certain other manned uninspected commercial vessels. Does not apply to the *Mr. Beldon*, a barge that does not carry passengers for hire.

Regulation	Subject Matter	Applicability
46 C.F.R. 25.30 Fixed Fire Extinguishing Gear	Requires certain types of fire extinguishing equipment depending on type of uninspected vessel. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies to motorboats, motor vessels, and certain barges carrying passengers. Does not apply to the *Mr. Beldon*, a barge that does not carry passengers.
46 C.F.R. 25.35 Backfire Flame Control	Requires gasoline engines installed in motorboats or motor vessels, except outboard motors, to have backfire flame control.	Applicability varies depending on type of uninspected vessel and activity. Do not apply to the *Mr. Beldon*, a barge that does not carry passengers for hire.
46 C.F.R. 25.40 Ventilation	Requires motorboats or motor vessels to ventilate their engines and fuel tank compartments.	
46 C.F.R. 25.45 Cooking, Heating, and Lighting Systems	Regulates cooking, heating, and lighting systems on vessels carrying passengers for hire. Do not regulate occupational safety and health hazards arising from drilling operations on inland waters.	

Regulation	Subject Matter	Applicability
46 C.F.R. 25.50 Garbage Retention	Requires uninspected vessels to meet garbage discharge, waste management, and placard requirements in 33 C.F.R. Pt. 151. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Did not apply to the *Mr. Beldon* at the time of the explosion because it was not engaged in an international voyage, see 33 C.F.R. Pt. 151.
46 C.F.R. 26.03 Special Operating Requirements	Imposes special operating requirements on small passenger vessels. Requires the individual in charge of an undocumented vessel involved in a marine casualty to provide necessary assistance. Requires certain vessels engaged on an international voyage to have an efficient daylight signaling lamp. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applicability varies depending on vessel type and activity. Does not apply to the *Mr. Beldon*, a documented barge that does not carry passengers and was not engaged at the time of the explosion in an international voyage.

Regulation	Subject Matter	Applicability
46 C.F.R. 26.08 Notice & Reporting of Casualty & Voyage Records	States that requirements for notice and reporting of marine casualties and retention of voyage records are contained in 46 C.F.R. Pt. 4. Does not regulate occupational safety and health hazards.	References requirements in 46 C.F.R. Pt. 4, which apply to the *Mr. Beldon*.
46 C.F.R. 26.15 Boarding	Requires uninspected vessels that are underway to stop immediately if hailed by a Coast Guard vessel and to maneuver in a manner that permits boarding. Does not regulate occupational safety and health hazards.	Did not apply to the *Mr. Beldon*, which was not underway at the time of the explosion.
46 C.F.R. 26.30 Work Vest	Sets requirements for buoyant work vests if they are carried on a vessel. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Only applies if work vests are used.

Regulation	Subject Matter	Applicability
46 C.F.R. Pt. 27 Towing Vessels	Regulates towing vessels. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies to towing vessels. Does not apply to the *Mr. Beldon*, a barge.
46 C.F.R. Pt. 28 Commercial Fishing Industry Vessels	Regulates commercial fishing industry vessels. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies to commercial fishing vessels, fish processing vessels, and fish tender vessels. Does not apply to the *Mr. Beldon*, which is not any of those types of vessels.
46 C.F.R. 42.09 Load Line Assignments and Surveys 46 C.F.R. 42.15 Conditions of Assignment of Freeboards	Sets load line and related requirements to ensure vessel stability. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies, with some exceptions, to United States flag vessels that engage in foreign or international voyages, in domestic voyages by sea, or on Great Lakes voyages. Did not apply to the *Mr. Beldon* at the time of the explosion because it was not engaged in any of those kinds of voyages.

Regulation	Subject Matter	Applicability
46 C.F.R. 42.15-75 Protection of the crew	Requires deckhouses for accommodation of the crew to be of satisfactory strength and requires guard rails, life lines, and gangways to meet certain requirements to ensure the safety of the crew. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies, with some exceptions, to United States flag vessels that engage in foreign or international voyages, in domestic voyages by sea, or on Great Lakes voyages. Did not apply to the *Mr. Beldon* at the time of the explosion because it was not engaged in any of those kinds of voyages.
46 C.F.R. Pt. 52 Power Boilers	Sets requirements for power boilers. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies to inspected and certificated vessels. Does not apply to the *Mr. Beldon*, an uninspected vessel.
46 C.F.R. 56.50-85 Tank-vent piping	Sets requirements for venting of containers, including fuel tanks. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies to inspected and certificated vessels. Does not apply to the *Mr. Beldon*, an uninspected vessel.

Regulation	Subject Matter	Applicability
46 C.F.R. Pt. 58 Main Propulsion Machinery	Sets requirements for material, design, construction, workmanship, and arrangement of propulsion machinery. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies to inspected and certificated vessels. Does not apply to the *Mr. Beldon*, an uninspected vessel.
46 C.F.R. Pt. 61 Periodic Tests and Inspections	Requires periodic tests and inspections of certain machinery and equipment. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies to inspected and certificated vessels. Does not apply to the *Mr. Beldon*, an uninspected vessel.
46 C.F.R. 61.15-10 Liquified petroleum gas piping for heating and cooking	Requires leak tests for heating and cooking piping. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies to inspected and certificated vessels. Does not apply to the *Mr. Beldon*, an uninspected vessel.

Regulation	Subject Matter	Applicability
46 C.F.R. 67.121 Official number marking requirement 46 C.F.R. 67.123 Name and hailing port marking requirements	Sets requirements for display of number, name, and hailing port of vessel in order for certificate of documentation to be valid for vessel operation. Does not regulate occupational safety and health hazards.	Any vessel of at least five net tons owned by a citizen of the United States is eligible for documentation. The *Mr. Beldon* is eligible for documentation and was documented.
46 C.F.R. 113.25 General Emergency Alarm Systems	Sets requirements for general alarm systems. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies to certain inspected vessels. Does not apply to the *Mr. Beldon*, an uninspected vessel.
46 C.F.R. 160.151-57(p) Liferaft Servicing	Prescribes information that liferaft servicing facility must include on certificate that it provides to liferaft owner when it services an inflatable liferaft. Does not regulate occupational safety and health hazards.	Applies to liferaft servicing facilities, not vessels. Does not apply to the *Mr. Beldon*, which is not a liferaft servicing facility. The *Mr. Beldon* is not required to have liferafts by Coast Guard regulations.

Regulation	Subject Matter	Applicability
46 C.F.R. 199.620 Alternatives for all vessels in a specified service	Addresses requirements for lifesaving systems on certain inspected vessels. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters.	Applies to certain inspected vessels. Does not apply to the *Mr. Beldon*, an uninspected vessel.